

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c.15, Schedule B;

AND IN THE MATTER OF an application by Toronto Hydro-Electric System Limited for an order approving or fixing just and reasonable rates and other charges for the distribution of electricity to be effective May 1, 2008, May 1, 2009 and May 1, 2010.

AND IN THE MATTER OF A Motion for Review and Variance
filed November 27, 2009 by Toronto Hydro Electric System
Limited

**Submissions of the
School Energy Coalition on
Threshold Issue**

1. The following are the submissions of the School Energy Coalition ("SEC") in relation to the motion for review and variance filed November 27, 2009 by Toronto Hydro-Electric Systems Limited ("THESL").
2. In Procedural Order #1 Issued December 17, 2009, the Board asked for submissions regarding the threshold issue of whether the motion for review should be heard.
3. In SEC's view, THESL's motion does not meet the threshold under section 45.01 of the Board's Rules of Practice and Procedure and should not be heard.
4. The motion is in respect of the Board's May 15, 2008 decision in EB-2007-0680, THESL's 2008 cost of service proceeding. In that decision, the Board ordered that \$10.3 in capital gains that was forecast to be realized from the sale of three properties (228 Wilson Ave.; 175 Goddard; and 28 Underwriters Road) be embedded as a revenue offset in THESL's 2008 distribution rates.
5. The Board also ordered the company to "employ a variance account to record any differences in the gains reflected in rates and the actual gains achieved from the sale of these properties either in 2008 or beyond." THESL was also ordered to record in this account the capital gain from the sale of an additional four other properties.¹

¹ EB-2007-0680, Decision, pg. 28.

6. In its current Notice of Motion, THESL states that the passage of time has rendered it impossible to implement the original May 15, 2008 decision since the original \$10.3 million forecast can no longer be embedded in 2008 distribution rates, which have already been superseded by 2009 rates.²

7. The possibility of the passage of time rendering the decision moot, however, was already contemplated by the Board in the original motion for review brought by THESL in June 2008. In that proceeding, THESL had sought various grounds of relief in respect of the May 15, 2008 decision including, inter alia, staying the original decision pending the outcome of THESL's appeal to the Divisional Court, and directing that the gains on the sale of the above-specified properties be recorded in a variance account for possible later disposition.

8. With respect to the stay request, the Board found that the issue was moot, since the Divisional Court had already stayed that portion of the decision. The Board then ordered THESL to record the "disputed \$10.3 million" in a deferral account "to ensure that it can be credited to ratepayers in the event that Toronto Hydro is ultimately unsuccessful with its appeal."³

9. That decision effectively preserved the May 15, 2008 decision by placing the original \$10.3 million forecast in a deferral account for disposition at a later date, depending on the outcome of the Divisional Court appeal.

10. The effect of the original May 15, 2008 decision and the June 27, 2008 review decision means that there are in effect two accounts in operation with respect to the capital gains:

- (a) a variance account to record any variance from \$10.3 million forecast and the actual gains achieved when the assets are sold; and
- (b) a deferral account to record the entire \$10.3 million forecast for disposition at a later date if THESL's appeal to the Divisional Court (and later Court of Appeal) were unsuccessful.

11. The two court appeals were, of course, unsuccessful. Therefore, the deferral account should now be paid out to ratepayers (per the June 27, 2008 decision) and the variance account should be used to track any variance from the forecast once the assets are sold (per the May 15, 2008 decision).

12. What THESL really appears to be arguing in this motion is that the capital gains realized to date are different from the original forecast amount and that that constitutes a ground for review under section 44.01 of the Rules- i.e. they constitute a change of circumstances, new facts, or "facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time."

² THESL Notice of Motion, para. 5.

³ EB-2008-0138, Decision and Order dated June 27, 2008, pg. 2.

13. In fact, the original facts on which the Board's decision was based remain the same: as confirmed at paragraphs 12-15 of the Notice of Motion, THESL has either already sold or intends to sell all of the properties that were originally forecast to be sold. The only change in facts may possibly be that the actual amount of the gain may differ from the forecast. However, as stated above, the possibility that the actual gains may be different from forecast was already contemplated by the Board in the original decision: that is the reason for the variance account referred to above.

14. Finally, SEC points out that the main reason the actual gains realized to date are only \$1.65 million are that the Goddard property has not been sold. That property was originally forecast to produce \$7.1 million of the \$10.3 million total capital gains forecast.⁴ According to the current Notice of Motion (para. 13), THESL expects to sell that property prior to 2010 rate finalization. In SEC's submission, therefore, what currently may appear to be a wide gap between the actual and forecast capital gain is in fact misleading: the difference results mainly from the fact that the property that was the major contributor to the forecast has not yet been sold.

15. In sum, there is no reason to disturb the Board's original decision. The original \$10.3 million forecast was recorded in a deferral account, and the Board's intent was that that deferral account be paid out if necessary following the court appeals. Furthermore any variances from the forecast- which can only be determined once all the properties are sold- will be recorded in the variance account.

Costs

16. The School Energy Coalition participated responsibly in this proceeding and contributed to the Board's understanding of the issues. SEC respectfully requests that it be awarded 100% of its reasonably incurred costs.

All of which is respectfully submitted this 6th day of January, 2010.

John De Vellis
Counsel to the School Energy Coalition

⁴ See Exhibit R1, Tab 3, Schedule 46, Appendix A in EB-2007-0680.